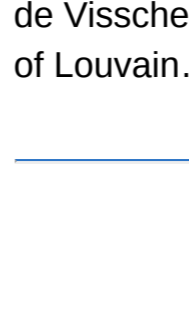
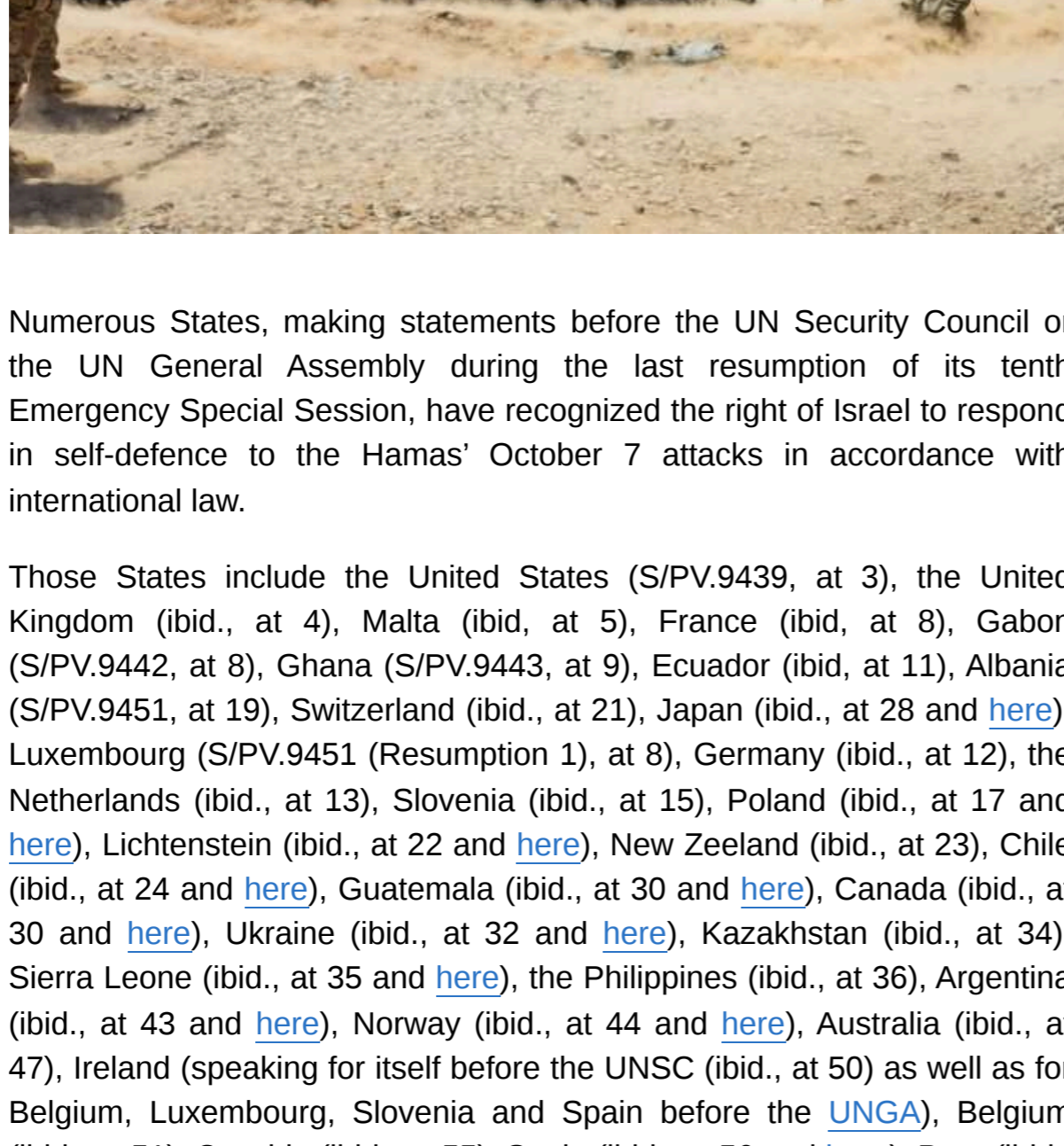


November 16, 2023

A plea for a right of Israel to self-defence in order to restrict its military operations in Gaza: when jus ad bellum comes to the aid of jus in bello

Written by [Raphael Van Steenberghe](#)



Raphael Van Steenberghe

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Numerous States, making statements before the UN Security Council or the UN General Assembly during the last resumption of its tenth Emergency Special Session, have recognized the right of Israel to respond in self-defence to the Hamas' October 7 attacks in accordance with international law.

Those States include the United States (S/PRV.9439, at 3), the United Kingdom (ibid., at 4), Malta (ibid., at 5), France (ibid., at 8), Gabon (S/PRV.9442, at 8), Ghana (S/PRV.9443, at 10), Switzerland (ibid., at 21), Japan (ibid., at 28 and [here](#)), Luxembourg (S/PRV.9451 (Resumption 1), at 8), Germany (ibid., at 12), the Netherlands (ibid., at 13), Slovenia (ibid., at 15), Poland (ibid., at 23), Chile (ibid., at 24 and [here](#)), Guatemala (ibid., at 30 and [here](#)), Canada (ibid., at 30 and [here](#)), Ukraine (ibid., at 32 and [here](#)), Kazakhstan (ibid., at 34), Sierra Leone (ibid., at 35 and [here](#)), the Philippines (ibid., at 36), Argentina (ibid., at 43 and [here](#)), Norway (ibid., at 44 and [here](#)), Australia (ibid., at 47), Ireland (speaking for itself before the UNSC (ibid., at 50) as well as for Belgium, Luxembourg, Slovenia and Spain before the UNGA), Belgium (ibid., at 51), Czechia (ibid., at 55), Spain (ibid., at 56 and [here](#)), Peru (ibid., at 58), the Holy See (ibid., at 59), Iceland (ibid., at 59 and [here](#)), Italy (ibid., at 62), [Greece](#), [Romania](#), [the Federated States of Micronesia](#), [Papua New Guinea](#), [the Kingdom of Tonga](#), [Saint Marino](#), [Bulgaria](#), [Singapore](#), [Costa Rica](#), [Mexico](#), [Nauru](#), [Cyprus](#), [the Marshall Islands](#), [Palau](#), and [Saint Vincent and the Grenadines](#). The right of Israel to self-defence has also been upheld by international organizations, like the EU (S/PRV.9439, at 30, [here](#) and [here](#)). However, certain States, such as Jordan (S/PRV.9439, at 12), Palestine (S/PRV.9443, at 17), Pakistan (ibid., at 27), Russia (S/PRV.9453, at 3 and [here](#)), Iran (S/PRV.9451 (Resumption 1), at 32), Bolivia (ibid., at 48), Syria (ibid., at 53 and [here](#)) and [Bangladesh](#) expressly denied the right of Israel to self-defence in their statements before the UN. This is also the position adopted by the [Arab States](#) at the November 13 Joint Arab Islamic Extraordinary Summit of the Organization of Islamic Cooperation.

Unlike other [posts](#) on the right of Israel to self-defence, this post does not question whether Israel can legally invoke the right of self-defence to use force in Gaza in response to the Hamas' October 7 attacks. For example, it does not deal with the debated issue of whether that right can be exercised in response to an armed attack by non-State actors – although the above-mentioned State practice seems to support such a view as the reasons for which States denied the right of Israel to self-defence are not based on the non-State nature of the armed attack. This post rather intends to show that the legal effects sought by States through recognizing or denying a right of State to self-defence are insufficient. It argues in favour of such a right since, contrary to what is pursued or fought by States, this right paradoxically does not provide Israel with any useful title to use force in Gaza, but involves constraints on such use of force, which proves valuable given the limits of *ius in bello*.

The 'permissive aspect' of the law of self-defence: the unnecessary search for or against a title for Israel to use force in Gaza

When considering the right of Israel to self-defence, most States only contemplated the permissive aspect of the law of self-defence, namely the right of Israel to use force in Gaza in response to the armed attack committed by the Hamas. This is noticeable in the attitude of both the States that recognized the right of Israel to self-defence and the States that denied it, in particular in their respective decision not to vote in favour of draft resolutions because the draft did not refer to (see e.g. S/PRV.9442, at 5 and 9, S/PRV.9453, at 8 and 10) or, instead, expressly mentioned (see e.g. S/PRV.9453, at 3) that right, respectively. Yet, the meaningful legal effect of a justification based on self-defence in this case does not arguably lies in its permissive aspect. It is, indeed, doubtful that such justification was necessary, especially for Western States, to allow Israel to resort to a use of force that would otherwise be prohibited under the UN Charter. In other words, it seems that the argument based on self-defence was not necessary to provide Israel with a specific title to use force in accordance with the UN Charter. This may be argued in light of the three following considerations.

Firstly, as amply demonstrated by [Marko Milanovic](#) in his post on this blog, self-defence is clearly useless if Palestine is not a State. Although controversial, Palestine's statehood is not endorsed by several States. As asserted by the ICJ, self-defence is indeed a [qualification](#) to the prohibition on the use and that prohibition is [only applicable](#) to the relations between States. It is then paradoxical that many States, including Israel (S/PRV.9439, at 11) itself, resort to this interstate argument based on self-defence, although they do not recognize Palestine as a State. If Palestine is not a State, the self-defence justification is not needed and force might be resorted by Israel without breaching the general prohibition on use of force enshrined in Article 2 (4) of the UN Charter.

Secondly, self-defence is similarly useless if Gaza was considered as still occupied by Israel. Israel's status as the occupier of Gaza is also controversial, but is endorsed by international organisations like the UN (A/HRC/7/17, 21 January 2008). In accordance with the ICJ findings in the [Wall case](#) and interpretations of those findings in legal scholarship (see e.g. [here](#), [here](#) and [here](#)), self-defence is irrelevant if the armed attack to which it is intended to respond comes from a territory controlled by the State invoking it. Actually, the Israeli occupation of Palestine is the main reason invoked by States to deny the right of Israel to self-defence. Some of those States, including Jordan (S/PRV.9439, at 12) and Russia (S/PRV.9453, at 3 and [here](#)), even expressly referred to the ICJ findings to that end. However, contrary to the aim pursued by making such reference, this does not mean that Israel cannot use force in occupied Gaza. Such resort to force is simply no longer barred by *ius ad bellum* considerations and it becomes only regulated by *ius in bello* – as well as of other relevant branches of international law, such as human rights.

Thirdly, even if Gaza is not considered as occupied, self-defence does not necessarily become a legally useful argument to provide Israel with a specific legal title to use force in Gaza. Other parts of Palestine, East Jerusalem and the West Bank, clearly remain occupied. The usefulness of the argument of self-defence can be examined in light of the legality of such occupation under *ius ad bellum*. This is again a controversial issue, that the [ICJ](#) is expected to deal with it in the recent advisory case brought before it. Two options must be examined.

The first is the legality of the Israeli occupation. It could be argued that such occupation is legal under *ius ad bellum*, notably in light of the criteria initially set out by the UN Security Council in its 1967 Resolution 242, namely the withdrawal of Israel from occupied territories, on the one hand, and the right of all the States in the region, including Israel, to live in peace, on the other hand. As interpreted by certain States (see e.g. Canada (S/PRV.1373, §215), Denmark (ibid., §230), the United Kingdom (S/PRV.1377, §337-39 and S/PRV.1394, §16), France (S/PRV.1394, §48), Japan (S/PRV.1398, §116) and the United States (S/PRV.2242, §18) and understood in the successive attempted peace processes, including the 2003 proposed road map (S/2003/529), these criteria have been claimed to be interdependent, with the withdrawal of the Israeli occupying forces being concomitant to the reinforcement of Israel's security. The argument goes on to assert that the occupation would still be legal because the security concerns of Israel, evolving from the threat from the Arab States to the threat of attacks by Palestinian armed groups, would not have been met. Regardless of the validity of that position, the lawfulness of the Israeli occupation, based on continuous but changing security concerns, would render useless any recognition of the right of Israel to self-defence against the armed attack by the Hamas from Palestine. The more general claimed justification for the occupation under *ius ad bellum* would remain operational and the current use of force by Israel in Gaza would be covered by that justification.

The second option is the illegality of the Israeli occupation under *ius ad bellum*. In a [2023 study](#) on the Israeli occupation, the Committee on the Exercise of the Inalienable Rights of the Palestinian People has concluded that this occupation was illegal. While the Committee asserted that such occupation was *illegal ab initio*, mainly because of the unlawfulness of the *ius ad bellum* argument invoked by Israel to start the Six-Day War in 1967, it further argued that, even if legal *ab initio*, the occupation would have become illegal due to indisputably illegal practices of Israel as an occupying power, such as the Israeli settlements. Admittedly, if the occupation of East Jerusalem and the West Bank is considered as illegal, it might become useful to recognize to Israel a right to self-defence in order to provide Israel with a specific – although legally *controversius* – title to use force in the other, unoccupied, parts of Palestine, including Gaza. However, it is unlikely that States recognizing a right of Israel to self-defence, such as the United States, would endorse the view that the Israeli occupation is illegal as a prerequisite for making their argument based on self-defence useful.

The 'constraining aspect' of the law of self-defence: the unintended or missed effect of restricting the Israel use of force in Gaza

Actually, the legally useful effect of the argument of self-defence rather lies in this case in the 'constraining' aspect of the law of self-defence, namely the conditions that regulates the exercise of the right of self-defence, especially the conditions of necessity and proportionality. As a result, when recognizing a right of Israel to self-defence, States such as the United States unwittingly imposed additional constraints on the military operations carried out by Israel, without providing it with any useful title to use force in Gaza under the UN Charter. On the other hand, when denying the right of Israel to self-defence, States such as Russia unwittingly dispensed Israel from such constraints, without precluding it from using force in Gaza in accordance with international law.

Only a very few States, including [Norway](#), [Saint Vincent and the Grenadines](#), the Netherlands (S/PRV.9451 (Resumption 1) at 13) and Kazakhstan (ibid., at 34) referred to that 'constraining' aspect of the law of self-defence when recognizing the right of Israel to self-defence before the UN. Most States rather insisted on respect for international humanitarian law (IHL). Usually, States merely recognized to Israel a right to act in self-defence in accordance with international law, in particular IHL (see e.g. the EU (S/PRV.9443, at 30), Albania (S/PRV.9451, at 19), France (S/PRV.9451 (Resumption 1), at 8), Lichtenstein (ibid., at 22), Sierra Leone (ibid., at 35), Ireland (ibid., at 50), Spain (ibid., at 56), [Cyprus](#) and [Palau](#)). Certain States even expressly mentioned the cardinal IHL principles of distinction, proportionality or precaution as the main or only law that Israel had to respect when acting in self-defence (see e.g. Malta (S/PRV.9439, at 5), Ecuador (S/PRV.9443, at 11), Albania (ibid., at 13), Gabon (S/PRV.9451, at 18) and Chile (S/PRV.9451 (Resumption 1), at 24)) or denied the right of Israel to self-defence because of claimed patent breaches of those principles (see e.g. Egypt (S/PRV.9451 (Resumption 1), at 3). However, it is of utmost importance, particularly in this case, to distinguish between the conditions of necessity and proportionality that are specific to the exercise of self-defence ('self-defence conditions') and the conditions regulating the conduct of hostilities under IHL, in particular the conditions of distinction, proportionality and precaution ('IHL conditions').

Firstly, these 'IHL conditions' are unable to put restraint on the whole war campaign of the defending State. As detailed [elsewhere](#), they are designed to regulate each specific military operation or, at the very most, a series of military operations pursuing the same specific military advantage. The whole war campaign might therefore be considered as *ad bellum* illegal even if it is claimed by the State acting in self-defence, such as Israel in this case, that it did not breach IHL.

Secondly, the 'IHL conditions' are unable to take into account all the damage caused by the action in self-defence. Only the damage caused to civilians or civilian objects are considered. By contrast, as emphasized by [scholars](#), the material factors for assessing the 'self-defence conditions' are much more numerous and include any material or human damage to the State where the action of self-defence is exercised, including the overall collateral damage to its civilian population and civilian infrastructure, even though they are not excessive under IHL. Accordingly, even if the State acting in self-defence, such as Israel, claims that its military operations are lawful under IHL, despite the significant number of those operations and the extensive – albeit non-excessive – collateral damage, these military operations might clearly be unlawful in light of the 'self-defence conditions'.

Thirdly, the respect for the 'IHL conditions' might prove very difficult to assess in the heat of the battle, for two main reasons: i) because of those conditions themselves, in particular their unspecified terms (like the notion of 'concrete and direct military advantage anticipated' contained in the condition of proportionality) or the complex calculations that they involve (like the balance to be struck between elements of different nature in order to assess the condition of proportionality); and ii) because of the lack of public access to the relevant facts at that time (like the confidential information on the plans of action of the military commanders). These difficulties in assessing the violations of the 'IHL conditions' and the potential commission of war crimes are particularly manifest with respect to the current attacks carried out by Israel in Gaza, as emphasized by certain [scholars](#) and shown by the doctrinal debate on the legality of specific attacks by Israel (see e.g. [here](#) and [here](#)).

Although the 'self-defence conditions' also involve vague terms and complex calculations, the assessment of those conditions might be more straightforward, provided that the nature of the condition of proportionality and its relationship with the condition of necessity are construed in light of State practice. Scholars usually favour an 'ends-means' (or teleological) approach to the condition of proportionality, meaning that the action in self-defence must be limited to what is strictly necessary to achieve the permissible end, which might include to repel the armed attack and/or to prevent future attacks (see e.g. [here](#) and [here](#)). As explained by [Marko Milanovic](#) in his post that refers to Professor David Kretzmer's [seminar 2013 article in the EJIL](#), two other approaches to proportionality have been identified, a 'tit-for-tat approach', meaning that the quantitative amount of force used in self-defence must be broadly the same as that involved by the armed attack, or a 'narrow approach', requiring a balance to be struck between the (possible) benefit gained by using force (in self-defence) and the (actual) harm caused by it. It is disputed in recent [posts](#) against which approach to proportionality the Israel's use of force must be tested. However, it is argued that none of these three approaches clearly fits with State practice. As demonstrated elsewhere ([here](#) and [here](#)), a close scrutiny of State practice since WWII (mainly including States' condemnations of disproportionate actions in self-defence before the UN Security Council and the UN General Assembly) shows that most States actually envisage the condition of proportionality as involving a quantitative test and as breached only once a manifest (or gross) disproportion exists between the magnitude and consequence of the armed attack and the magnitude and consequence of the action in self-defence. A quantitative test also seems to be the approach followed by the ICJ (see e.g. [here](#), [here](#) and [here](#)). Although this approach might look like the 'tit-for-tat' version of the condition of proportionality, it is different. As similarly envisaged by the arbitral tribunal in the [Nauffaa case](#) in 1928 in relation to proportionate armed reprisals, the State acting in self-defence must be allowed to resort to more significant means and cause more damage than the means used and damage caused by the armed attack in order to defend itself. However, State practice strongly suggests that the action in self-defence nonetheless becomes disproportionate in case of flagrant, manifest or gross disequilibrium between the two sides of the balance.

In addition, as also drawn from State practice, this 'manifest (or gross) disproportion' test involved by the condition of proportionality seems to be used by States not in order to make cynical calculations, but to assess whether the condition of necessity is fulfilled. Indeed, that condition clearly involves a 'means-end' test, which is not easy to assess. The manifestly disproportionate nature of the damage caused by the action in self-defence, compared to the damage caused by the armed attack, is actually used by States as an easy means for ascertaining the unnecessary nature of the measure taken in self-defence. This allows States determining that the action in self-defence is pursuing another (unlawful) purpose than the defence of the victim State, such as retribution or revenge. As a result, the 'self-defence conditions' can be more straightforwardly assessed than the 'IHL conditions' for two main reasons: i) it is ultimately based on material and more easily accessible factors, which are moreover of similar nature, namely the overall damage caused by the armed attack and those caused by the State acting in self-defence; ii) the conditions are considered as violated when there is a manifest disproportion between those damage.

Among the States having expressed their view on the armed conflict in Gaza before the UN Security Council and the UN General Assembly, only one State expressly engaged so far into an assessment of the 'self-defence conditions'. After recalling that Israel had a right to self-defence and that its military action must be proportionate and necessary, [Saint Vincent and the Grenadines](#) made the following statement on November 2:

The UN Relief and Works Agency for Palestine Refugees in the Near East (UNWRA), estimates that over 640,000 people have been internally displaced and are sheltering in UNWRA facilities. Over 9,000 people have been killed in the Gaza Strip since October 7 th, with children making up more than 3000 of the aggregate, and over 20,000 injured. Behind each of these numbers is a face, no less worthy of a right to life than you or me. These statistics unambiguously illustrate that the justification of self-defence has gone beyond what is proportionate and necessary, and therefore exceeded the realm of what is legally acceptable.

Although denying the right of Israel to self-defence on October 25 before the UN Security Council (S/PRV.9453, at 3) and on October 31, before the UN General Assembly (see [here](#)), Russia had implicitly proceeded to a typical proportionality assessment when making the following statement on October 18 at an UNSC meeting (S/PRV.9443, at 6):

In Israel, the number of deaths stands at 1,400 people, and 3,900 people have been injured. In Palestine, the number of deaths is more than 3,500, and 10,000 people have been injured. Today those figures are even higher. According to United Nations reports, approximately 450 children have died in Gaza, 750 more remain under the rubble of the buildings destroyed during the air raids.

Since then, it may plausibly be asserted that the disproportion between the victims on both sides has significantly increased to the detriment of the Palestinians, although information on the number of victims must carefully be checked. If one agrees with the [Executive Director](#) of WHO's Health Emergencies Programme that the information from the Palestinian Ministry of Health is reliable, the use of force by Israel against Hamas manifestly disproportionate, with more than 10,000 deaths and 25,400 injured on the Palestinian side against 1,400 deaths and 5,400 injured on the Israeli side. All the other damage, such as displacements, should also be counted. It is then questionable whether, in light of such manifest disproportion, the measure taken by Israel do not extend beyond what is necessary to protect itself and that alternatives to its use of force should be sought and found. This might suggest that the use of force by Israel has become legal under the law of self-defence, even if Israel claims that it respects IHL. In any case, recognizing a right of Israel to self-defence proves very valuable, not in order to allow Israel to use force, since such a right was not needed for that purpose under the UN Charter, but to put restraint on Israeli military operations, especially when *ius in bello* is unable to provide (sufficient) constraint.

NB: Originally, this post was designed to be one of the two parts of a longer post, elaborated with my colleague Jérôme de Hemptinne and meant to cover Israel's use of force under both *ius ad bellum* and *ius in bello*. In the meantime, the other part of this longer post, drafted by [Jérôme de Hemptinne](#), and addressing the qualification of the armed conflict has been published. The two posts might therefore be read together as they involve certain ideas shared by both authors, in particular that solutions under both bodies of law depend upon preliminary views on controversial issues, such as the statehood of Palestine or the status of Gaza as an occupied territory.

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COMMENTS

Nicolas Boeglin says
November 16, 2023
Dear Professor Van Steenberghe
Many thanks for your posts.
Concerning the number of deaths and injured civilian in Gaza that you mention in the very last part of your text, may I refer you to the last UN OCHA/OPT report in which we can read that:

"On 15 November, for the fifth consecutive day, following the collapse of services and communications at hospitals in the north, the MoH in Gaza did not update casualty figures. The reported fatality toll of Palestinians in Gaza as of 10 November at 14:00 (latest update provided) stood at 11,078, of whom 4,506 were said to be children and 3,027 women. Another 27,490 Palestinians have reportedly been injured".
Source:
<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-40>

With regards to Israel peculiar form to "self defense" when it received rockets from Gaza in 2014, may I refer you what seems to be a deliberate act of revenge, referring you (and our colleagues at EJIL:Talk) to the document containing stabbing testimonies of Israeli soldiers who took part in the 2014 ground offensive.
<https://www.breakingthesilence.org.uk/pdf/ProtectiveEdge.pdf>

Looking at the dramatic numbers for Palestinian deaths and injuries in Gaza since October 7th, 2023 it seems to me that the same type of instruction is given to the Israeli military.
By the way, if you or our colleagues know of a similar document on testimonies of pilots and commanders of IDF aerial forces, please feel free to send me the link.

Sincerely yours
Nicolas Boeglin

Nicolas Boeglin says
November 18, 2023
Dear Professor Van Steenberghe
Concerning the very peculiar way to "self defense" of Israel mentioned in my previous comment, may I refer you to the last updated report of UN OCHA / OPT (to November 17):
<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-42>

I take also the opportunity to refer you (and our EJIL:Talk colleagues) to a recent collective initiative of South Africa before ICC:
"South Africa, along with like-minded States, submits joint referral of the situation in Palestine to the ICC"
Source:
<https://www.dircog.gov.za/south-africa-along-with-like-minded-states-submits-joint-referral-of-the-situation-in-palestine-to-the-icc/>

About this collective initiative, in your view, is there any possibility to see an EU State member in coming days joining it?

Yours sincerely
Nicolas Boeglin